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Supreme Court of the United States

OCTOBER TERM, 1969

ROBERT I. TOUSSIE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MURRAY I. GURFEIN,
Attorney for Petitioner,
655 Madison Avenue,
New York, N. Y. 10021.

JACOB W. HELLER,
of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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Supreme Court of the United States

OCTOBER TERM, 1969

ROBERT I. TOUSSIE,

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against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered May 14, 1969.

Opinion Below

The opinion of the Court of Appeals is printed in the Appendix to this petition (A1-11).* The opinion of the District Court for the Eastern District of New York is reported at 280 F. Supp. 473 and is also printed in full in the Appendix to this petition (A12-21).

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1969 (A22) and a timely petition for rehearing was denied on June 9, 1969 (A23). The time to file this

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* References to the Appendix will be preceded by the letter "A". All references without such designation will be to petitioner's Appendix in the Court of Appeals.

petition was extended from July 9, 1969 to August 8, 1969 by order of Mr. Justice Harlan, dated June 23, 1969 (A24).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a pattern of legislation has been created by the Universal Military Training and Service Act (50 U.S.C. App. §§ 451 *et seq.*) and Selective Service Regulation (32 C.F.R. § 1611.7[c]), prescribing a continuing duty to register, which compels a delinquent registrant to inculpate himself as to his initial failure to register, in violation of his rights under the Fifth Amendment as construed in *Marchetti* v. *U. S.*, 390 U. S. 39 (1968), *Grosso* v. *U. S.*, 390 U. S. 62 (1968), *Haynes* v. *U. S.*, 390 U. S. 85 (1968), and *Leary* v. *U. S.*, 395 U. S. 6, 23 L. ed. 2d 57 (1969)?

2. Whether Congress intended the offense of failing to register for selective service to be outside the provisions of the general five year statute of limitations (18 U.S.C. § 3282), which covers all non-capital offenses "Except as otherwise expressly provided by law."?

3. Whether the Universal Military Training and Service Act constitutionally empowers the executive branch to promulgate a regulation, that despite Congressional silence on the subject, makes registration a continuing duty?

4. Whether a conscientious objector can be denied the right under the First Amendment to have a jury pass on the sincerity of his belief that he could not register for the draft for reasons of conscience?

Statutes Involved

The pertinent provsions of the Constitution (First Amendment and Fifth Amendment), statutes (50 U.S.C. App. §§ 453, 454(a) and 462(a); 18 U.S.C. § 3282), Executive Orders (Nos. 2799 and 2942), and Selective Service Regulations (32 C.F.R. §§ 1611.7, 1613.1-16, 1642.3), are all printed in the Appendix hereto (A25-44).

Statement

Petitioner was convicted in the United States District Court for the Eastern District of New York, upon a jury verdict, of having failed to register for the draft in violation of 50 U.S.C. App. § 462(a). He was sentenced pursuant to 18 U.S.C. § 4208(b), being committed to the custody of the Attorney General for study and report. The indictment charged in one count that the crime was committed over the course of an 8-year period from June 23, 1959 (the date of petitioner's 18th birthday) through February 3, 1967, "both dates being approximate and inclusive" (5a).

Petitioner admittedly never registered for the draft on his 18th birthday or at any time thereafter. He could not do so for reasons of conscience. The trial was devoted in substantial degree to presentation of petitioner's conscientious beliefs and their development, although the trial court did not permit the issue to be passed upon by the jury. There was an abundance of testimony, demonstrating that his convictions were sincerely held, being the product of upbringing and rooted in family tradition and having been formulated and publicly announced by petitioner years before the statutorily mandated time of registration for the draft.

Among the significant evidence adduced on the issue, was a copy of petitioner's proposed valedictory address

to be delivered upon graduation from junior high school, which he wrote at the age of 14 (149a-51a). Petitioner was denied the valedictory honors because of the virulent anti-war theme of the text and his refusal to change it (147a). The act of registration to petitioner was an inextricable part of the military process. He believed that registration constituted acquiescence therein and he could not bring himself to do so.

The evidence also showed that these views of petitioner coalesced with factors of an emotional and psychological nature to prevent him from registering. Medical and psychiatric testimony was offered and it was urged on the basis thereof that petitioner also lacked capacity to formulate the requisite criminal intent for commission of the crime charged.

Petitioner moved before trial to dismiss the indictment on the grounds that it was time-barred under the 5 year general limitation provision of 18 U.S.C. § 3282 and constitutionally defective in violation of the Fifth Amendment (6a-36a). The District Court (Dooling, J.) prior to the decisions by this Court in *Marchetti, Grosso* and *Haynes,* denied the motion. The said motions were renewed during the course of trial and, together with the other relevant motions made on petitioner's behalf, were also denied (Mishler, J.).

A companion motion to dismiss an indictment involving petitioner's brother was simultaneously made and granted by Judge Dooling on the ground that the said prosecution was time-barred (38a-40a). The Government took a direct appeal to this Court from the said order of dismissal. On review by the Solicitor General, however, that appeal was withdrawn.

Reasons for Granting the Writ

Summary

Important questions of constitutional and statutory construction, all of first impression, are here presented. The Court of Appeals, while rejecting petitioner's contentions, characterized the questions as "substantial" (A2) and "novel" (A6)—and further indicated, we submit, in its discussion of the issues and problems raised, that review by this Court is warranted.

I.

The theory adopted by the Court below to avoid the 5 year statute of limitations was that the selective service regulations imposed upon petitioner a "continuing duty" to register, even after age 18.

We maintain that if the statute and regulation imposed upon the petitioner a continuing *duty* to register, despite his initial failure to register at age 18, such compulsion to register thereafter compels self-incrimination in violation of the Fifth Amendment. For the registration itself would expose the delinquent registrant to prosecution for his failure to register on time. This is the first time that the Fifth Amendment has been invoked to challenge the registration provisions of the draft law. We believe that its application is mandated under the decisions of this Court in *Marchetti, Grosso, Haynes* and *Leary.* All relevant tests propounded by those decisions have been satisfied here. In particular, since registration in accordance with the regulations could not be accomplished without divulgence by the registrant of his date of birth, among others, a "real and appreciable" hazard of incrimination as to the prior failure to register (which would be automatically divulged thereby) is created.*

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*We note, that the Court has granted certiorari for argument next term in No. 1144, *Breen* v. *Selective Service Local Board No.*

(*footnote continued on following page*)

A strange concept has been introduced to Federal criminal jurisprudence by the determination below. A continuing crime has been fashioned where the defendant must confess guilt in order to terminate its continuance and start the statute of limitations running. Such a requirement is inimical to the Fifth Amendment and subversive of the legislative policy reflected in statutes of limitation. Its perpetuation should not be permitted by this Court.

II.

We urge that the 5 year general statute of limitations (18 U.S.C. § 3282) commenced running on petitioner's 18th birthday and bars the instant prosecution. This result is dictated by the plain language of the general limitation statute and the relevant provisions of the Universal Military Training and Service Act which has no separate or different limitations period. The Court below, without a statutory basis, relied upon a selective service regulation to impose a "continuing duty" to register beyond age 18. It permitted an act of the Executive branch to extend the scope of a crime beyond the limits of its statutory definition and to render the legislatively prescribed limitation period meaningless. The regulation, as construed, permits an unconstitutional usurpation by the Executive of Legislative prerogatives. There is no evidence of a legislative intent to treat offenses under the draft law different from other offenses covered by the general statute of limitations.

The Court below adopted the continuing duty theory, but held that the duty to register, and hence the crime, continued only to age 26. This theory, an untenable compromise, as we demonstrate below, presents a conflict in Circuits. The Fourth and Sixth Circuit Courts of Appeal

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(*footnote continued from previous page*)

16 and in No. 1176, *Gutknecht* v. *U. S.*, in which other aspects of Fifth Amendment claims will be reviewed. We understand, too, that the Government has taken a direct appeal to this Court in *U. S.* v. *Sisson*, 297 F. Supp. 902 (D. C. Mass. 1969, Wyzanski, J.).

have not imposed a cutoff date at age 26, but imply that the statute never runs (*McGregor* v. *U. S.*, 206 F. 2d 583 [4th Cir., 1953]; *Gara v. U. S.*, 178 F. 2d 38, 40 [6th Cir. 1949], affd. 340 U. S. 857 [1950]; cf. *Vogel* v. *U. S.*, 162 F. 2d 54 [5th Cir.], cert. denied 332 U. S. 791 [1947]). The Second Circuit commented that such view, reflected in the Fifth and Sixth Circuit decisions, was "unfair and absurd" (A5). Resolution of the issue remains for this Court. In the only prior case reaching this Court where the question was presented (*Gara* v. *U. S., supra*), the decision below was affirmed without opinion by an equally divided Court.

The force of petitioner's contentions on the statute of limitation issue and the difficulties inherent in the statutory scheme, led the Court below to conclude that

> "It may be that application of the statute of limitations to this area deserves particularized congressional attention, with a statute, rather than regulations, stating the applicable limitation periods." (A6)

We contend that Congress has already passed such a statute (18 U.S.C. § 3282), which there is no valid reason to ignore.

The presence of a host of unresolved "problems lurking in the background" (A6) were further noted by the Court below, all of which are integrally related to the question of Congressional intent. Thus, as the Court below noted, "is each day of failure to register a separate offense, for which a prosecution can be brought?"; "Can the knowing and wilful failure to register when the duty first attaches be legally cured by a subsequent tardy registration?"; "are there other continuing duties under the selective service system that are not cut off at age 26, and, if so, when, if ever, does the statute of limitations run as to them?" (A6). Resolution of the foregoing questions, as well as

the orderly and proper administration of the Universal Military Training and Service Act in a manner consistent with the statutory mandate and constitutional principles is dependent upon the grant of review by this Court. The far reach of this statute and the large number of young men who are delinquent make the issue one of supreme public importance.

III.

The final issue presented relates to the First Amendment and its application to one's conscientious beliefs. We maintain that consistent with this Court's decision in *Girouard* v. *U. S.*, 328 U. S. 61 (1946), a defendant is constitutionally entitled to have the jury pass upon the sincerity of his conscientious beliefs and to acquit if it finds that the failure to register was a result thereof. *U. S.* v. *Nugent*, 346 U. S. 1 (1953), relied upon by the Court below (A10), did not treat with the issue. The trial judge refused to submit this question to the jury. It remains a matter of first impression for clarification by this Court, although we believe the language in *Clark* v. *Gabriel*, 393 U. S. 256, 259 (1968), supports our view.

ARGUMENT

As to question 1:

The Fifth Amendment precludes application of the continuing duty theory to the act of registration.

The Courts below held that the Selective Service Regulation (32 C.F.R. §1611.7[c]) imposed a "continuing duty" to register on a delinquent who had initially failed to register at age 18.

Our position may be stated as follows: If it is held that one has a continuing duty to register, under penalty of criminal sanction, registration at any time after the date first required therefor is tantamount to compelling an ad-

mission of criminal culpability for prior failure to register. Registration cannot be compelled under penalty of criminal sanction at any time after the date first prescribed therefor; for otherwise one is being required to confess guilt in violation of Fifth Amendment guarantees (*Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 [1965]; *Marchetti* v. *U. S., supra; Grosso* v. *U. S., supra; Haynes* v. *U. S., supra; Leary* v. *U. S., supra*).

If there is a continuing duty to register, it is not accompanied by a statutory immunity from prosecution for a late registration. The duty to register, after the date of initial registration has passed, is still compulsory, but the very act of compliance renders the late registrant subject to criminal prosecution. This is compulsory self-incrimination in its simplest form.

It is as if there were two registration statutes: (1) a statute requiring registration on the first day; and (2) a statute requiring registration thereafter with a provision that compliance under the second statute renders the registrant subject to prosecution under the first statute. Even though the duty may continue, there is no doubt that a wilful failure to register when first required to do so made a completed crime. That being so, subsequent registration itself may be tantamount to a confession—and a confession compelled by the continuing duty theory. The failure to provide for a statutory immunity coextensive with the constitutional privilege makes the late registrant as vulnerable to prosecution as the Communist party member, the gambler, or the marijuana possessor. (See also *U. S.* v. *Rosenson,* 291 F. Supp. 874, 876 (E. D. La. 1968) for application of this Court's decisions to a prosecution for failure to register and surrender, upon re-entry, a certificate evidencing a prior registration, required to have been obtained before leaving the United States.)

The standard emerging from this Court's decisions for application of the Fifth Amendment is the "substantiality

of the risks of incrimination" which confront the claimant. (See e.g., *Marchetti* v. *U. S.*, 370 U. S. at p. 54). If the hazards created are "real and appreciable," application of the Fifth Amendment is required (*Haynes* v. *U. S.*, 390 U. S. at p. 97). These tests were deemed satisfied in *Marchetti,* the Court observing that under the registration provisions there involved, the defendant "was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in the chain' of evidence tending to establish his guilt" (390 U. S. at p. 48).

Similarly, in *Haynes,* the prospective registrant could reasonably fear that the possession established by his registration would facilitate his prosecution under the making and transfer clauses of § 5851; and that the information required to be furnished under the registration statute was "likely to facilitate their arrest and eventual conviction."

The regulatory scheme involved in the case at bar utterly failed to provide a means for one who had previously failed to register to subsequently register without requiring him to sign a confession of guilt. This is far more than the mere "facilitat[ion]" of "his prosecution" (*Haynes* v. *U. S., supra*), sufficient to require application of the Fifth Amendment.

Thus, we refer to the applicable regulations in Title 32 C.F.R. § 1613.1—16. It is first provided in § 1613.11(a) that "every registrant before being registered shall enter his name and place of residence upon one of the numbered lines on the Tally Sheet" and "shall be registered on a Registration Cart (SSS Form No. 1)." Among the more significant items which must be included on the form, which the registrant is required to divulge (and its accuracy ensured by the registrar), is the registrant's *date of birth* (§1613.12[c]).

The context of the foregoing procedures is one of compulsion, in its entirety, by direct mandate of the statute

and the regulations. Section 1613.16 of the regulations, as well as § 462 of the Act, contemplate stiff penalties (5 years) for failure to divulge the information. Immediate referral of the matter to the United States Attorney is also mandated by the regulations. "Persons attempting to obstruct or delay" registration, the regulations further provide "should be dealt with promptly and firmly" (32 C.F.R. § 1613.16).

Section 1642.3 provides that compliance by the draft board with procedures concerning delinquency (i.e., warnings to registrants) is not a condition precedent to prosecution under Title 1, § 12 of the Military Selective Service Act of 1967 (50 U.S.C. App. § 462).

The only way a registrant could terminate his "continuing duty" would be to incriminate himself by late registration. In other so-called "continuing offenses" like conspiracy, the defendant does not have to perform an act of self-incrimination in order to abandon the conspiracy. Under the reasoning of the Court below there is no way to abandon the "continuing offense" except by the act of registering—an act of compulsory self-incrimination.

The reasoning of the Court of Appeals, distinguishing the *Albertson, Marchetti, Grosso* and *Haynes* decisions, is that "his (petitioner's) inaction did not give rise to the threat of punishment beyond that he had already risked" (A9). The distinction is invalid. The Fifth Amendment does not deal with punishment, but with *evidentiary* self-incrimination.

The constitutional test, we submit, is not whether additional punishment is provided but whether the statute, as construed, requires the individual to perform an act which is self-incriminatory. Analysis will be furthered by treating the draft registration statutes as two statutes as previously discussed, *supra,* p. 9.

The Communist or gambler at least gets absolution from prosecution under the registration statute by registering;

the man who registers late for the draft does not. He has merely begun the process of convicting himself.

These views have been re-emphasized by the Court in the recent *Leary* decision, as follows (395 U. S. at p. 18):

> "Since compliance with the transfer tax provisions would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group, we can only decide that when read according to their terms these provisions created a 'real and appreciable' hazard of incrimination."

So, too, in contrasting the right of an accused under the Fifth Amendment to remain silent at his trial, the Court in *Leary* aptly characterized the aspect of the privilege here involved as "the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act" (395 U. S. at p. 28).

The Court below conceded that it is, indeed, "arguable" that the continuing duty regulation "is directed at a 'selective group inherently suspect of criminal activities' *Albertson* v. *Subversive Activities Control Board, supra,* 382 U. S. at 79" (A7-8). The group who failed to register at 18 are a "selective group inherently suspect of criminal activities". It is well-known that there are many young men in this group who are colloquially known as "draft resistors". It is to this group that the regulation addresses itself with a continuing duty.

The Court below proceeded to reason, however, that "many initial failures to register may be due to such innocent reasons as illness, ignorance, or inability to get to a local board" (A8). So, too, there may be a lawful possessor of marijuana, or a legitimate possessor of firearms, etc. This does not preclude application of the constitutional privilege to the statute at bar. The Fifth Amendment applies, as here, where the status disclosed as a result of the subsequent registration is "presumptively"

indicative of guilt or *prima facie* on the issue (*Russell* v. *U. S.*, 306 F. 2d 402, 411 [9th Cir. 1962]; cited with approval by this Court in *Haynes, supra*). Similarly, the Court held in *Albertson, supra*, that it is sufficient if the information called for by the registration forms "might be used as evidence in or at least supply investigatory leads to a criminal prosecution" (382 U. S. at p. 78).

We hardly need remind the Court, moreover, that the protection of the Fifth Amendment extends to the innocent as well as the guilty (*Grunewald* v. *U. S.*, 353 U. S. 391 [1957]). Here the delinquent registrant would be faced with the burden of showing he had been ill or ignorant, for he is presumptively guilty of an act of omission.

Under the decision of the Court below a person *must* first submit himself to prosecution under his continuing duty in order to invoke the Fifth Amendment. The protection of the Fifth Amendment, we submit, cannot be so circumscribed.

The Court below while "conced[ing] that doing so might well focus unwanted attention" on the delinquent registrant, maintained that "it may be possible for a young man to register late without giving the incriminatory information, cf. *United States* v. *Sullivan*, 274 U. S. 259 (1927)" (A8). We assume the Court of Appeals had in mind the appearance of the young man at the draft board, and his invocation of the Fifth Amendment in response to certain questions which he is required to answer, such as the date of his birth.

In the first place, the appearance of the young man at the draft board without giving the required information would not serve to qualify him as having submitted to registration in accordance with the prevailing case law. (See e.g., *Michener* v. *U. S.*, 184 F. 2d 712 [10th Cir. 1950]; see also *Cannon* v. *U. S.*, 181 F. 2d 354 [9th Cir. 1950]; *U. S.* v. *Henderson*, 180 F. 2d 711 [7th Cir. 1950]; *Richter* v. *U. S.*, 181 F. 2d 591 [9th Cir. 1950]).

Secondly, such a procedure would serve to emasculate the constitutional provision. Invocation of the Fifth Amendment under such circumstances would be an unmitigated admission of criminal culpability. As the Court stated in *Marchetti, supra,* "to have required him to present his claim to Treasury officers would have obliged him 'to prove guilt to avoid admitting it' " (390 U. S. at p. 50).

Appearance at the draft board under the circumstances here projected, would require invocation of the Fifth Amendment even as to divulgence of the defendant's name (cf. *Kaohelaulii* v. *U. S.*, 389 F. 2d 495 [9th Cir. 1968]).*

"[B]arring" the use of any "possibly incriminating information in any subsequent prosecution," as the Court of Appeals further suggested (A8), adopting Judge Dooling's reasoning, would not satisfy the mandate of the Constitution. The Court of Appeals, indeed, acknowledged that Judge Dooling's reasoning was before its rejection by this Court in the cases cited above (A8).

So, too, the balancing of constitutional interests alluded to by the Court of Appeals in its opinion (A7, A9-10), cannot further serve to preclude application of the Fifth Amendment. True, the Government is constitutionally authorized to raise an army. Self-registration—*to the extent that it will involve incriminatory admissions*—however, is not necessary to serve the legitimate governmental purpose. Alternative procedures for securing the necessary information could well be utilized without impinging upon the rights guaranteed by the Fifth Amendment. Such was the express reasoning of this Court in *Marchetti* and *Haynes,*

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* In *Kaohelaulii,* defendant reached the age of 18 on January 28, 1956. He did not register for the draft, however, until 8 years later, on October 15, 1964. Immediately after his tardy registration, he was interviewed by agents of the FBI and thereafter indicted and convicted for having failed to register for the draft on his 18th birthday or thereafter until his appearance at the board to do so on October 15, 1964.

supra, where it was stated in relevant part that the Court was "fully cognizant of the Treasury's need for accurate and timely information, but other methods, entirely consistent with constitutional limitations, exist by which such information may be obtained" (*Haynes*, 390 U. S. at p. 98; see also *Marchetti*, 390 at U. S. at p. 60).

The sources for securing such information and procedures satisfying the need of the Government for information are available without compelling the defendant to provide the information and inculpate himself. For example, municipal Boards of Health (birth certificates) or Boards of Education (school records) could be required to file duplicate copies of their records with the appropriate Federal authorities and thus preserve the integrity of the Fifth Amendment.

The now accepted safety value of the immunity statute, may also be utilized. It would be a simple matter for Congress to grant immunity from prosecution to those questioned and required to divulge information in connection with registration. Under such circumstances, one who failed to register on his 18th birthday might, if Congress so dictated, be subjected to the continuing duty to register. He could not then avail himself of the protection of the Fifth Amendment for failure to do so since his own statements could not be used. In terms of practical effect, moreover, the use of an immunity provision would serve a salutary purpose. A young man at the age of 18, impressionable and immature in many ways, may have been impelled for misguided reasons to breach his duty of registration. In later years (or for that matter on the day following 5 days after his 18th birthday when he breached his duty by failing to register), he may well recognize the folly of his ways. However, without the protection of the Fifth Amendment (or in lieu thereof, an immunity statute), he is afraid to register for fear that he will be prosecuted for previously failing to do so. The result, in the absence of immunity, is, in practical effect, to frustrate the very

Congressional purpose, which the registration provisions were designed to effectuate.*

We recognize that it may be argued that *Marchetti* and the cases following it all relate to possible self-incrimination in State Courts through the compulsion of registering under a Federal statute. We do not believe the distinction to be valid because the Fifth Amendment is equally applicable to Federal crimes. In any event would this not be the very next question that properly confronts the Court under the doctrine of *Leary*?

As to questions 2 and 3:

The offense charged was time-barred by the five year limitation period prescribed by 18 U.S.C. § 3282; any other construction is constitutionally invalid as an executive usurpation of legislative power.

The relevant statutory provisions giving rise to the crime here charged are 50 U.S.C. App. § 453 (establishing the duty to register) and § 462 (prescribing penalties for violation of the act). Presidential Proclamations No. 2799 and No. 2942 set forth the specific dates for registration, providing in respect of petitioner that he register on his 18th birthday or within five days thereafter (Pres. Proc. No. 2799 subd. [j]).

The general statute of limitations (18 U.S.C. § 3282) provides that a person may not be prosecuted, tried or punished for an offense unless indicted within five years next after its commission "Except as otherwise expressly provided by law."

The Universal Military Training and Service Act does not "otherwise" provide a separate and different statute of limitations.

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* The immunity would, of course, not apply if the non-registrant was apprehended for failure to register by other than self-incriminatory means.

The Courts below avoided the 5-year limitation period by holding that the offense was a continuing one in reliance, not upon the statute, but upon a Selective Service regulation (32 C.F.R. § 1611.7[c]), which provided that "(c) The duty • • • to present himself for and submit to registration *shall continue at all times* • • •." (emphasis supplied).

The Court of Appeals frankly conceded that "the tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the staute beyond its stated term" (A4). It recognized that the continuous offense doctrine was not mandated by the statute, but by the regulation. Despite this the Court held the indictment not to be time-barred on two grounds:

1. That the 5 year statute *is* being recognized, but that it does not begin to run when the crime is completed because the regulation prescribes a continuing duty; and

2. That if the 5 year statute is in fact deemed extended, it is because the continuing duty regulation is an express provision of "law" (A5-6).

It expressly held, moreover, that the regulation is not outside the Congressional grant of power (A5).

We contend that the Court erred in all of its alternative formulations.

1. The Court's concession that "for all practical purposes" (A4) the general 5 year statute of limitations has, indeed, been extended is more cogent than its lip service to the 5 year statute and its conclusion that the issue is merely when that statute begins to run.

(a) There is no expression of Congressional policy to indicate a desire by Congress to have a different statute of limitations apply to failure to register for the draft than to other crimes. Where Congress intended to im-

pose a continuing duty with respect to selective service, it knew how to say so.

Unlike § 453, § 454 does contain a continuing duty provision. Thus, § 454(a) further provides that any registrant who has failed or refused to report for induction "*shall continue to remain liable for induction* and when available shall be immediately inducted" (emphasis supplied).

(b) The enunciation of a continuing offense theory poses hard questions which the Court of Appeals frankly recognized as "problems lurking in the background" (A6).

It is no answer for the Court of Appeals to elide the question on the ground that a particular indictment "charged only one offense—wilful failure to register over a lengthy period of time—and appellant never did register" (A6). Even if the "continuing duty" theory did convert the failure to register into a single offense, the question still remains when that offense was committed or completed. Could a registrant defeat an indictment by claiming that he still had time to register at any time up to age 26? Such a contention would be absurd. But its very absurdity shows that the crime was completed and indictable when the petitioner failed to register on attaining the age of 18 years. And there is no statute evidencing a Congressional intent that the ordinary consequences—the running of the general 5 year statute of limitations *from that time*—should not follow.

We submit that in the absence of any statute the general statute of limitations creates a jurisdictional fact which the prosecution must prove. A plea to the statute of limitations is a plea to the merits (*U. S.* v. *Barber*, 219 U. S. 72, 78 [1911]). Such a plea affects his liability "as matter of substantive law" (Holmes, J. in *U. S.* v. *Oppenheimer*, 242 U. S. 85, 87 [1916]; see also *People* v. *Hines*, 284 N. Y. 93 [1940]). We believe there is no

precedent for creating a jurisdictional element contrary to the statute itself.

The continuing offense theory, moreover, aside from having no statutory warrant, logically makes prosecution possible without any limitation whatever. Thus, under the wording of the regulation, a person 70 years old can be prosecuted for having failed to register 52 years before at the age of 18.

Contrary to the regulations, the statute and proclamations prescribe specific dates and not a period of years for accomplishment of the registration. With respect to persons who are outside the existing category of 18 through 26 as of the time the statute took effect (like petitioner) Presidential Proclamation No. 2799, subd. (j) of paragraph 1, simply provides that "Persons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter". Presidential Proclamation No. 2942 issued in 1951 makes similar provision.

It is thus evident that a person is given only one date to register. With respect to those reaching the age of 18 years after the effective date of the statute (like petitioner), that one specific date is when he reaches the age of 18 years and 5 days.

We submit that if a person fails to register on the prescribed date or within the 5-day period thereafter, as above set forth, the breach of duty occurs then and there. There is nothing in the statutory scheme which says that the breach of duty continues for 8 years, as the Court below found.

2. To the extent that the regulations import a concept of duty to register beyond the dates prescribed by the statute, the breach of which gives rise to criminal culpability, we

submit that an unconstitutional usurpation of legislative authority has been effected.

The argument of the Court of Appeals, in this respect also, is untenable. Historically an extension of a statute of limitations is a legislative, not an executive function.*

When Congress used the phrase "Except as otherwise expressly provided by law," it meant by statute not executive order. The enactment of statutes of limitation is so exclusively within the legislative sphere that it would strain language to hold that Congress intended so serious a departure from the clear historic meaning of "law" in

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* The very phrase "statute" of limitations connotes legislative action. An early statute of limitations in England was created by Parliament, not the King. (The Treason Act, 1695 [7 and 8, Will. IIIc. 3]; 9 Halsbury Statutes of England 82).

The first criminal statute of limitations after the adoption of the Constitution was by Act of April 30, 1790, Ch. 9 § 32, 1 Stat. 119 (See 18 U.S.C. § 581-3).

In the Colonies before the Revolution limitations for prosecution of crime were by the Colonial legislatures (see 102 Univ. of Pa. L. Rev. 630, 631 [1954], citing Whitmore, Colonial Laws of Mass. 163 [1889]; Charter and Laws of the Province of Pa. 1682-1700 [173-4] (George, Neod and McComant [1879]).

As early as 1684 there was a 6 months limitation on offenses against the Government, but the limitation was created *by statute*. (See also Howe, Readings in American Legal History 19 [1949], Radin, Anglo-American Legal History § 79 [1936].)

The common understanding of the Bar is expressed in ALI Model Penal Code, Tentative Draft No. 5, § 1.07(4): "An offense is committed either when every element occurs, or, if a *legislative* purpose to prohibit a continued course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed" (emphasis supplied).

The American Law Institute there comments, p. 23: "The draft in effect provides a presumption against a finding that an offense is a continuing one for purposes of time limitation. The assumption is that the continuing offense exception too freely applied is inconsistent with the purpose of time limitations. See, for example * * *, *Fogel* v. *U. S.*, 162 F. 2d 54 (1947)."

this context. This is particularly so upon examination of the various recognized exceptions to the 5 year general limitation provision.

In accordance with the mandate of 18 U.S.C. § 3282 ("Except as otherwise *expressly* provided by law"), when Congress wanted a crime to be continuing in nature and the limitation period kept open, it said so. We are unaware of a single instance where a limitation period has been tolled or extended by administrative or executive decree. In every instance, to our knowledge, where this has been done, there is an express statute so providing.

A striking instance may be found in 50 U.S.C. App. § 454(a), above quoted, which expressly declares, in relevant part that a delinquent inductee "shall continue to remain liable for induction."

In further contrast to the statute at bar, we refer, for illustrative purposes, to the offense of concealment of a bankrupt's assets under 18 U.S.C. § 3284. Congress there expressly provided that such offense shall "be deemed to be a continuing offense" until the debtor is discharged or a discharge is refused; and that the period of limitations "shall not begin to run" until such time. In the absence of statute, the crime had been held not to be a continuing offense (*Warren* v. *U. S.*, 199 Fed. 753 [5th Cir., 1912]).

We submit that express Congressional direction in a manner consistent with the foregoing, absent in the situation at bar, is necessary to exclude a case from the operation of 18 U.S.C. § 3282.*

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*We urge that "by law" means by "statute" historically. This is supported by Reviser's Note to 18 U.S.C. § 3282 which says: "Section 582 of Title 18, U.S.C. 1940 ed. and Section 746(g) of Title 8, U.S.C., 1940 ed., Aliens and Nationality, were consolidated. 'Except as otherwise expressly provided by law' was inserted to avoid *enumeration* of exceptive provisions" (emphasis supplied). This obviously meant statutory provisions.

As the regulation was construed below, it is unconstitutional as an executive usurpation of well-defined historical legislative power. Only Congress can extend or provide for the tolling of its own statutes. While it is perhaps fashionable these days to fudge the separation of powers as constitutional doctrine, the rule is firmly embedded in our constitutional tradition that the executive may not legislate as such (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388 [1935]; *A.L.A. Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495 [1935]).

It is constitutionally forbidden for the Executive branch to create a continuing offense without a specific mandate from Congress. History, as we have seen, *supra*, shows a number of continuing offenses created by Congress itself. We know of no such history for the Executive branch.

The suggestion that the Executive branch had the right to create a continuing offense under the Universal Military Training and Service Act is like saying that the Commissioner of Internal Revenue has the right to prescribe by regulation that a failure to file an income tax return is a continuing offense. It would be for Congress and Congress alone to make such a determination.

The Court below assumed, moreover, that the statutory language presumably showed an intention on the part of Congress to permit the President to make the duty to register a continuing duty. It relied upon the language giving the President power to fix the time or times and place or places for registration (A4).

We submit that a close reading of the statute (50 U.S.C. App. § 453) indicates that the reference to "such" time or times or place or places indicates that it is in apposition to the first and each subsequent registration proclaimed by the President. It is more likely that when Congress said *at* such time or times and place or places, it meant specific days and time of day. The requirement is that he register

on the day or days fixed for the first or any subsequent registration and that he must present himself at such time or times or place or places. This construction is fortified by the circumstance that Congress has specifically provided for a *continuing* liability for induction (18 U.S.C. §454[a]), although it did not do so for registration.

It is true, as the Court of Appeals noted in its opinion (A3-4), that the prior decisions on the subject have held that a continuing duty obtains, which serves to preclude application of the statute of limitations (*Fogel* v. *U. S.*, 162 F. 2d 54 [5th Cir.], cert. denied, 332 U. S. 791 [1947]; *McGregor* v. *U. S.*, 206 F. 2d 583 [4th Cir. 1953]; *Gara* v. *U. S.*, 178 F. 2d 38, 40 [6th Cir. 1949], affd. 340 U. S. 857 [1950]). But it does not appear that the constitutional question was raised.*

Indeed, a conflict exists even between those cases and the decision of the Court of Appeals below. In *McGregor* and *Gara, supra,* the continuing duty imposed was deemed to be open-ended with no time limitation whatever. The Court in this case recognized that such logical extension of the holdings in those cases was "unfair and absurd" (A5). It, therefore, imposed a cutoff date at age 26. A conflict of interpretation, therefore, now exists between the Second Circuit in this case and the Fourth and Sixth Circuits in the *McGregor* and *Gara* cases. *Gara* reached this Court. It was affirmed, however, by an equally divided Court. Resolution of the issue is, therefore, a matter of first impression for this Court.

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* The Court of Appeals also cited *U. S.* v. *Guertler,* 147 F. 2d 796 (2d Cir. 1945). The crime there involved, in our view, was not "analogous" (A4). It involved a *change* of status—to wit: the registrant moved his residence. It is reasonable to require the registrant to notify the local draft board of such change of residence The same reasoning, however, does not apply to a failure to register on a fixed date. Having failed to register on the date prescribed, no change in status thereafter occurs of which the board requires notification.

As to question 4:

Petitioner was entitled under the First Amendment to have the jury pass on the sincerity of his conscientious beliefs which prevented him from registering.

Petitioner requested the following charge to the jury, which was denied by the trial court:

> "15. If you find from the testimony in this case that the defendant held a conscientious and religious belief that the act of registration was only another extension of war, violence and legalized killing, and if you believe that the defendant's failure to register arose from such belief, then you must find the defendant not guilty." (50)*

In its main charge the Court stated:

> "* * * and if * * * he nevertheless chose to disregard the law and abide by what he believed to be a higher moral principle, his reason, his motive for failure to register under those circumstances, is not an answer to this charge." (286a)

We maintain that this was constitutional error and that the Court should hold that the First Amendment's guaranty of freedom of conscience bars the prosecution of one who failed to register on the grounds of conscientious belief sincerely held; that, at the very least, he is entitled to have a jury pass on the issue.

The Court of Appeals recognized that "a proper test of a civilized society is the solicitude with which it treats its principled dissenters", and that "in theory the sincerity

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* See also Request to Charge No. 17 (50a). Other instructions were requested as to the sincerety of petitioner's beliefs and also denied (Requests to Charge No. 4 and No. 5 [48a-49a]).

of one who claims that his conscientious beliefs prevented him even from registering could be tested by the trier of fact in a criminal trial" (A10).** Nevertheless, in reliance upon *U. S.* v. *Nugent,* 346 U. S. 1 (1953), the Court of Appeals held that "under present doctrine requiring them to register for eventual assignment to non-military alternative service is constitutional" and "the present procedures of administrative decision and judicial review do not constitute an infringement of the first amendment" (A10-11).

This fails to cover the situation where a conscientious objector truly believes that adherence to the registration system itself is contrary to his fundamental beliefs.

Nugent, supra, merely discussed the availability of administrative remedy during the post-registration period. It did not discuss the situation here presented. If a conscientious objector fails to register *because* of his beliefs, there is no tribunal that can pass upon the validity of such beliefs other than the trial jury when he is prosecuted. To take away from the trial jury the right to determine the bona fides of his conscientious beliefs is to invade that field of conscience which this Court has recognized in the case of other principled dissenters.

In contrast to *Nugent,* the Court's prior decision in *Girouard* v. *U. S.,* 328 U. S. 61 (1946) rather supports petitioner's position. There *U. S.* v. *Macintosh,* 283 U. S. 605 (1931) and *U. S.* v. *Schwimmer,* 279 U. S. 644 (1929) were overruled. Chief Justice Hughes, dissenting in *Macintosh* (joined by Justices Holmes, Brandeis and Stone) had maintained that objection to bearing arms as

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** The sincerity of petitioner's beliefs, grounded in family tradition, upbringing and independent pursuit of pacifism from the age of 11—highlighted by his anti-war validictory address at the age of 14—were more than amply demonstrated during the course of the trial below; and accordingly, there was substantial basis in the record for the charge requested.

a matter of conscience was protected by the First Amendment. He wrote, in relevant part (283 U. S. at p. 634):

> "The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field."

A citizen who refuses to register for the draft acts at his peril, since the jury may readily find that the alleged conscientious beliefs which impelled his dereliction were not sincere. It is submitted, however, that the First Amendment, at the very least, consistent with the pronouncements of this Court in *Girouard* and the *Macintosh* dissent, guarantees to him the right to have the jury pass on the issue where he is on trial for his liberty.

CONCLUSION

Under all the circumstances hereinabove set forth, it is respectfully prayed that the writ of certiorari should be granted.

Respectfully submitted,

MURRAY I. GURFEIN,
Attorney for Petitioner.

JACOB W. HELLER,
Of Counsel.